

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ROGERS,

No. C 09-3533 WHA (PR)

Petitioner,

**ORDER OF DISMISSAL;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

vs.

JAMES WALKER, Warden,

Respondent.

(Docket No. 2)

INTRODUCTION

This is a habeas case filed by a California prisoner proceeding pro se under to 28 U.S.C. 2254. He has also applied for leave to proceed in forma pauperis.

ANALYSIS

In his petition, petitioner states that he was convicted of robbery, burglary, and assault with a deadly weapon in San Francisco County Superior Court in 2005. The conviction was affirmed on appeal to the California Court of Appeal, and the California Supreme Court denied review. Petitioner states that at the time he filed the instant federal habeas petition, he had a petition for a writ of habeas corpus pending in the California Supreme Court. (Pet. at 5.)

The exhaustion requirement applicable to federal habeas petitions is not satisfied if there is a pending post-conviction proceeding in state court. *See* 28 U.S.C. 2254(b)-(c); *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). If a post-conviction challenge to a criminal conviction is pending in state court, a potential federal habeas petitioner must await the

1 outcome of that challenge before his state remedies are considered exhausted. *Ibid.* This rule
2 applies irrespective of whether the issue raised in the pending state petition is included in the
3 federal petition, for the reason that a pending state court challenge may result in a reversal of
4 the petitioner's conviction, thereby mooted the federal petition. *Ibid.* (citations omitted).

5 As petitioner has a habeas petition proceeding pending in the California Supreme Court,
6 the instant petition for a writ of habeas corpus must be dismissed.

7 **CONCLUSION**


8 This habeas petition is **DISMISSED** without prejudice to petitioner's refiling his claims
9 after all state court post-conviction challenges to petitioner's conviction have been completed
10 and all claims petitioner wishes to raise in federal court have been exhausted in accordance with
11 28 U.S.C. 2254(b)-(c).

12 In light of petitioner's lack of funds, the application to proceed in forma pauperis
13 (docket number 2) is **GRANTED**.

14 The clerk shall close the file.

15 **IT IS SO ORDERED.**

16 Dated: October 13, 2009.

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18 WILLIAM ALSUP
19 UNITED STATES DISTRICT JUDGE
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